STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
v	No. 261515 Oakland Circuit Court
SEAN ANDREW MCMILLIAN, Defendant-Appellant.	LC No. 04-195781-FC

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right jury convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first argues that the trial court erred when it denied his motion for a directed verdict of acquittal on the charges of first-degree and second-degree murder. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove first-degree murder the prosecution must show that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); see, also, MCL 750.316(1)(a). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998).

When defendant moved for a directed verdict of acquittal, evidence had been presented which showed that defendant went to Joseph Deangelis and Bradley Jones's trailer home to get his girlfriend, Alexa Sebree. Defendant was angry with Sebree because she was at the trailer and she refused to leave with him. The evidence also showed that defendant went to the trailer with a loaded firearm. While at the trailer, defendant argued with Adam Hannick and Deangelis because Hannick and Deangelis thought defendant was physically abusing Sebree. Defendant was asked to leave. However, defendant remained at the trailer and continued to argue with Hannick and Deangelis. The evidence showed that defendant reached behind his back and pulled out a gun, aimed the gun at Deangelis, and stated that he was going to shoot Deangelis.

Evidence was also presented which showed that defendant reached behind his back twice before pulling out his gun. Defendant shot Deangelis in the chest and Deangelis died from the gunshot wound. No weapons were found near Deangelis's body and it was determined that the shot that killed him was fired from at least three feet away.

The evidence presented by the prosecution was sufficient for a reasonable jury to conclude that defendant had sufficient time to think about his actions before he pulled out his weapon and shot Deangelis. Premeditation may be inferred by the circumstances surrounding the killing. *Id*. at 371. It is reasonable for a jury to infer that defendant's actions were premeditated and deliberate because defendant went to the trailer with a loaded gun. Defendant was asked to leave the trailer several times, but he refused to leave. Defendant reached behind his back twice before pulling out the gun. Defendant pulled out the gun, aimed the gun at Deangelis, and stated that he was going to shoot Deangelis. Defendant shot Deangelis and fled the scene. The evidence was sufficient for a jury to conclude that the elements for a first-degree murder conviction were proven, i.e., that defendant intentionally killed Deangelis and that the act of killing was premeditated and deliberate. *Mette, supra*. Therefore, the trial court did not err in denying defendant's motion for a directed verdict of acquittal on the charge of first-degree murder.

To prove second-degree murder, the prosecution must show that there was: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). For second-degree murder, malice can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Bulmer*, 256 Mich App 33, 36-37; 662 NW2d 117 (2003).

The evidence was sufficient for a jury to conclude that the elements for a second-degree murder conviction were proven. The evidence presented showed that defendant shot and killed Deangelis. The evidence was sufficient for a jury to conclude that defendant acted with malice when he shot Deangelis. "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Id*. at 37. Defendant brought a loaded gun to the trailer. Defendant pulled out the gun on Deangelis, aimed the gun at him, and stated that he was going to shoot him. Defendant shot Deangelis when Deangelis was at least three feet away and was being restrained. The evidence was sufficient for a jury to conclude that defendant's use of a firearm during the confrontation with Deangelis was an act that "intentionally set in motion a force likely to cause death or great bodily harm." See *id*. at 36-37. Thus, the prosecution produced sufficient evidence from which a reasonable jury could conclude that defendant acted with malice when he shot Deangelis.

The evidence failed to show defendant's actions were justified or excused. As a general rule:

> [T]he killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably

> believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

The evidence failed to show that defendant acted in self-defense when he pulled his gun on Deangelis and shot him. Prior to the shooting, Justin Harris, defendant's friend, and Hannick held Deangelis back to prevent Deangelis from approaching defendant. Although evidence was presented which showed that Deangelis pushed forward, Deangelis was still on the porch and at least three feet away from defendant when defendant shot him. Deangelis never got free from Hannick's hold and was still wrapped in Hannick's arms when the shot was fired. Harris also testified that, although Deangelis broke free from his hold, Deangelis never stepped off the porch.

Based on the evidence presented, it is reasonable for a jury to infer that defendant used deadly force at a time when Deangelis was not an immediate threat. Hannick and Harris held Deangelis back from approaching defendant and no evidence was presented that showed Deangelis had a weapon. Moreover, the evidence showed that defendant could have easily retreated to his car before firing at Deangelis.

The evidence was sufficient to prove the elements for a second-degree murder conviction, i.e., that Deangelis was killed by an act of defendant, that defendant acted with malice when he killed Deangelis, and that defendant's actions were without justification or excuse. *Fletcher*, *supra*. For the reasons stated, defendant's claim that the trial court erred when it denied his motion for a directed verdict of acquittal on the charges of first-degree and second-degree murder is without merit.

Defendant next argues that the trial court erred when it denied his request for a self-defense against persons acting in concert jury instruction. We disagree. We review preserved claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review jury instructions in their entirety to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

A criminal defendant has the right to have a properly instructed jury. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). For that reason, "jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975).

Because defendant presented no evidence that warranted a self-defense against those acting in concert jury instruction, the court was correct in denying defendant's instructional request. CJI2d 7.24 provides:

> A defendant who is attacked by more than one person [or by one person and others helping and encouraging the attacker] has the right to act in self-defense against all of them. [However, before using deadly force against one of the attackers, the

> defendant must honestly and reasonably believe that (he / she) is in danger of being (killed / seriously injured / forcibly sexually penetrated) by that particular person.] [See, also, *People v Johnson*, 112 Mich App 483, 486-487; 316 NW2d 247 (1982).]

The evidence presented showed that defendant shot Deangelis. Prior to the shooting, defendant told Deangelis "to get back." Defendant pointed the gun at Deangelis and told Deangelis that he would shoot him. Hannick and Harris restrained Deangelis. However, Deangelis moved forward and defendant fired a single shot.

The evidence does not show that defendant was being attacked by Hannick and Deangelis when defendant shot and killed Deangelis. The evidence also fails to show that Hannick encouraged Deangelis to do any harm to defendant, while defendant was aiming the gun at Deangelis. However, the evidence shows that Hannick restrained Deangelis from approaching defendant when defendant pulled out his gun. Defendant's actions do not show that he felt threatened by both Hannick and Deangelis when he shot Deangelis. When defendant pulled out his gun, he did not point the gun at Deangelis and Hannick, but instead, he specifically aimed the gun at Deangelis and told Deangelis that he would shoot him. No evidence was presented which showed that defendant threatened to shoot Hannick or that defendant pointed the gun at Hannick. The evidence did not support the requested instruction, and therefore, the trial court did not err in refusing to give the instruction.

Defendant's final argument on appeal is that prosecutorial misconduct denied him a fair trial. Defendant argues that he was denied a fair trial when the prosecutor mischaracterized evidence during closing argument. We disagree. Defendant did not preserve this issue for appeal. Where issues of prosecutorial misconduct are not preserved, this Court reviews the record for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant argues that the prosecutor mischaracterized Hannick's testimony when she stated to the jury that Hannick did not intend to harm defendant. However, defendant fails to provide an accurate record citation for this alleged improper statement. A party may not leave it to an appellate court to search for a factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Moreover, "an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Because defendant has failed to show where in the record this alleged impropriety occurred, this Court cannot determine if the prosecutor engaged in misconduct. For that reason, defendant has abandoned this issue for appellate review. *Id.*

Defendant also argues that the prosecutor engaged in misconduct when she made the following statement:

> You don't get to throw your girlfriend down the stairs because you're so concerned about her, rip her out of the trailer and throw her down five stairs because I'm so concerned about her. You know, he's such a good guy, her health and all. And then try to yank her up by the throat, by the hood because, you

know, I'm a good guy, I'm really concerned about her and then when somebody helps her, kill them.

The statement at issue was not improper because the evidence supported the statement. Defendant went to the trailer to get Sebree because he was concerned about her well-being. However, Sebree and defendant argued when defendant arrived at the trailer. Sebree screamed and when Hannick went outside, Sebree was on the ground covering herself while defendant was standing over her. Although Sebree testified that she fell down the stairs and that defendant did not push her, Sebree's mother, Linda Lapointe, testified that Sebree told her otherwise on that night. Lapointe testified that Sebree told her that defendant "pulled her out of the trailer and then threw her to the ground." According to Lapointe, Sebree also told her that after defendant "threw her to the ground" some boys came to her defense. Testimony was also presented which showed that defendant tried to pick Sebree off of ground by pulling the hood of her coat. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra* at 450. The statement was not improper because the evidence supported the statement. Moreover, the trial court instructed the jury that the lawyers' statements and arguments were not evidence. Even if he challenged remarks had any prejudicial potential, the trial court's instructions were sufficient to eliminate any prejudice that may have stemmed from the prosecutor's statement. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter